

IN THE CIRCUIT COURT OF MINGO COUNTY, WEST VIRGINIA

**STATE OF WEST VIRGINIA ex rel.
PATRICK MORRISEY,
Attorney General,**

Plaintiff,

v.

**Civil Action No. 17-C-113
Honorable Miki Thompson**

**CAV'S COACH COMPANY, LLC,
a West Virginia limited liability company,
ALLABOARD TOURS & CHARTERS,
LLC, a West Virginia limited liability
company, and CHRISTOPHER TODD
CAVENDER, individually and in his
capacity as the sole member and owner of
Cav's Coach Company, LLC and
AllAboard Tours & Charters, LLC,**

Defendants.

FINAL ORDER

On the 8th day of February, 2018, came the Plaintiff State of West Virginia ex rel. Patrick Morrisey ("the State" or "Attorney General"), and also came the Defendants Cav's Coach Company, LLC, AllAboard Tours & Charters, LLC, and Christopher Todd Cavender (collectively "Cav's Coach" or "Defendants"), by their respective counsel, for a hearing on the sole remaining issue in the Complaint filed by the State in this matter. The Court notes that the parties entered into a Stipulation on November 2, 2017, in which they reached agreement on all issues except for the question of whether this Court should impose civil penalties against Defendants for engaging in repeated and willful violation of the West Virginia Consumer Credit and Protection Act and, if so, what the penalties should be. The parties agree that there are no

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material facts in dispute and now ask this Court to resolve the sole remaining issue on their cross motions for summary judgment.

After consideration of the parties' respective motions, including all pleadings of record herein and the argument of counsel, the Court hereby makes the following findings of fact and conclusions of law as set forth herein below.

RECENT PROCEDURAL HISTORY

1. The State filed a Complaint for Injunction, Consumer Restitution, Disgorgement, Civil Penalties, and Other Appropriate Relief ("Complaint") against the Defendants on June 27, 2017 alleging that the Defendants violated the West Virginia Consumer Credit and Protection Act ("WVCCPA"), W.Va. Code § 46A-1-101 *et seq.*

2. The State's Complaint alleged that Cav's Coach failed to refund at least \$22,682.00 for failure to provide charter bus services or otherwise fulfill its obligations under contracts with at least three groups.

3. First, Cav's Coach defaulted on its obligations to provide charter bus services for Kermit Pre K-8 School ("Kermit"). Specifically, Kermit paid \$13,382.00 in advance to Cav's Coach for a trip to Williamsburg, Virginia, which was scheduled to depart on May 18, 2017. After cancellation of the trip, Cav's Coach only refunded \$3,000.00 to Kermit, leaving a balance owed of \$10,382.00.

4. Second, Cav's Coach defaulted on its obligations under a contract to provide charter bus transportation to Crum Pre K-8 School ("Crum"). Specifically, Crum paid \$9,000.00 in advance to Cav's Coach for a trip to Disney World in Orlando, Florida, which was to depart on May 21, 2017. Upon learning that it could not raise sufficient funds for the trip, Crum cancelled the trip approximately seven weeks in advance and was entitled to a full refund under

its contract for services. Cav's Coach refunded only \$1,500.00, leaving a balance owed of \$7,500.00.

5. Third, Cav's Coach organized a trip for a private group to Orlando, Florida, which was scheduled to depart on June 11, 2017. Cav's Coach unilaterally cancelled that trip and failed to refund the \$4,800.00 owed to two Logan County residents.

6. On July 14, 2017, the State filed a Motion for Temporary Injunction asking this Court to order Cav's Coach to make all refunds owed to Kermit, Crum, and the two Logan County residents for failure to fulfill its obligations to provide charter bus transportation under its contracts with those groups.

7. On July 27, 2017, this Court entered an Order submitted by the parties requiring Cav's Coach to refund all amounts owed, \$22,682.00, on or before August 14, 2017 and enjoining Cav's Coach from engaging in the business of providing charter bus transportation or other travel or tourism activities pending final determination of the State's Complaint.

8. Cav's Coach made the payment of \$22,682.00 to the State as required by the Order.

9. On November 8, 2017, the parties filed a Stipulation with the Court indicating that they had reached agreement on all issues in dispute in this matter with the sole exception of whether the Court should impose civil penalties upon Cav's Coach for engaging in repeated and willful violations of the WVCCPA, as authorized by W.Va. Code §§ 46A-7-111(2).

10. On September 8, 2017, Cav's Coach filed a Motion for Summary Judgment, which incorporated a supporting Memorandum of Law, and an Answer to the Complaint.

11. On January 5, 2018, the State filed a Motion for Summary Judgment along with a Memorandum of Law in Support of its Motion.

12. On January 16, 2018, Cav's Coach filed its Response to the State's Motion for Summary Judgment.

PREVIOUS PROCEDURAL HISTORY

13. In its Complaint, Motion for Summary Judgment and supporting Memorandum, the State outlined what it represented to be Cav's Coach's past history of failing to meet its contractual obligations to provide charter bus services to various groups and consumers prior to commencement of the current litigation. This history includes at least four previous instances in which Cav's Coach failed to make refunds after unilaterally cancelling trips or otherwise failing to meet its obligations under contracts with the groups.

14. Cav's Coach does not dispute the State's characterization of its past actions, which are summarized below.

Reedy Elementary School PTO -2010

15. Students and parents of Reedy Elementary School in Roane County, West Virginia paid Cav's Coach \$6,800.00 for two charter buses to take them to New York City on December 5, 2010. During transport, one of the charter buses broke down, leaving students and parents stranded for many hours by the highway waiting for a replacement bus or transportation home. Cav's Coach could not find a replacement bus, which resulted in cancellation of the trip. Despite repeated promises and the fact that Cav's Coach continued in operation, Cav's Coach failed to refund the money to the Reedy PTO.

16. This failure prompted the Attorney General to sue Cav's Coach in the Circuit Court of Roane County on January 3, 2013. An Agreed Order was entered January 4, 2013, granting the State a judgment against Cav's Coach in the amount of \$7,800.00, consisting of \$6,800.00 owed to the Reedy PTO and a civil penalty of \$1,000.00. The Order permitted Cav's

Coach to make monthly payments of \$650.00 until consumer refunds and the civil penalty were paid in full. The Order also enjoined Cav's Coach to make "full and immediate refunds" whenever it failed to provide transportation or other services in the future. *See* Order attached as Exhibit 1 to State's Motion for Summary Judgment.

17. After making some payments, Cav's Coach defaulted, which resulted in the filing of a Petition for Contempt after several broken promises by Cav's Coach to resume payments. Cav's Coach finally paid the remaining balance of \$4,550.00 in November 2014 on the eve of a contempt hearing, almost four years after the date of the trip.

Private Group Trip to New York - 2012

18. Two private individuals contracted with Cav's Coach to provide charter bus services for a group trip they had organized to New York City, which was to depart June 29, 2012. Just before midnight on the eve of departure, Cav's Coach contacted the trip organizers by telephone to inform them that the trip was cancelled due to mechanical problems with the bus. The trip organizers succeeded in finding a replacement bus company to take them to New York, but at a higher cost.

19. Cav's Coach refused to make restitution for the additional cost the group incurred for the replacement bus caused by Cav's Coach's last minute cancellation. Three years after cancellation of the trip, and after repeated demands and threats of legal action by the Attorney General, Cav's Coach finally made restitution of \$680.00 to the group.

Wayne County Senior Citizens – 2013

20. A group of 19 senior citizens contracted with Cav's Coach to take them to Gatlinburg, Tennessee in December, 2013. On the eve of departure, Cav's Coach notified the group that the trip was cancelled because the bus was having mechanical problems. Cav's Coach

failed to provide refunds to the senior citizens, which prompted several of them to file complaints with the Attorney General. After several demands and threats of legal action by the Attorney General, Cav's Coach finally refunded \$4,229.00 to 19 senior citizens three months after the trip was cancelled.

Marshall University Students – 2014

21. On June 24, 2014, Marshall University sued Cav's Coach in the Circuit Court of Cabell County when it failed to show up on May 2, 2014, to transport a group of students and faculty to New York City. A default judgment for \$11,620.00 was entered against Cav's Coach, consisting of \$3,900.00 for bus tickets and \$7,500.00 for the loss of non-refundable tickets to Broadway shows. Cav's Coach never satisfied the judgment. After concluding that it would not collect the full amount owed, Marshall University agreed to accept \$4,120.00 from Cav's Coach, thereby leaving its students without full compensation for their losses.

FINDINGS OF FACT

22. Cav's Coach failed to make timely refunds to Kermit, Crum, and two Logan County residents after failing to fulfill its contractual obligations to these groups and consumers as alleged by the State in its Complaint.

23. Prior to the commencement of this civil action, Cav's Coach similarly failed to make timely refunds after failing to fulfill its contractual obligations to other groups and consumers on four occasions.

24. The State filed a civil action against Cav's Coach in the Circuit Court of Roane County on January 3, 2013, when Cav's Coach failed to make refunds to students, parents, and teachers who purchased tickets for a charter bus trip to New York City that was cancelled because of mechanical problems with the buses.

25. On January 4, 2013, an Agreed Order was entered in the Circuit Court of Roane County granting the State a judgment against Cav's Coach in the amount of \$7,800.00, consisting of \$6,800.00 owed to the Reedy PTO as refunds for tickets and a civil penalty of \$1,000.00. The Order permitted Cav's Coach to make monthly payments of \$650.00 until the consumer refunds and civil penalty were paid in full.

26. The Order also enjoined Cav's Coach to "refrain from violating the West Virginia Consumer Credit and Protection Act" and to "provide full and immediate refunds" upon failing to fulfill its obligation to provide charter bus services to groups or consumers in the future.

27. Cav's Coach failed to make "full and immediate refunds" to groups and consumers who paid for services that were not provided on at least five occasions following entry of the Order issued by the Circuit Court of Roane County. These instances include failure to make refunds to a Wayne County senior citizens group in December, 2013; failure to make refunds to a Marshall University group in May 2014; failure to make refunds to Kermit and Crum in May, 2017; and failure to make refunds to two Logan County residents in June, 2017.

28. Cav's Coach made refunds to the groups and consumers in question only after legal action or threats of legal action by the Attorney General.

CONCLUSIONS OF LAW

29. In 1974, the Legislature enacted the WVCCPA, which "is a remedial statute intended to protect consumers from unfair, illegal and deceptive business practices and must be liberally construed to accomplish that purpose." *Fleet v. Webber Springs Owner's Association*, 772 S.E. 2d 369, 377 (W.Va. 2015). In addition to establishing a private right of action for consumers, the Legislature authorized the Attorney General to enforce the WVCCPA, W.Va.

Code § 46A-7-102.

30. Sales of charter bus services and related travel services by Cav's Coach constitute sales of services as defined by WVCCPA, W.Va. Code § 46A-6-102(d). As such, Cav's Coach's sales are consumer transactions that are subject to the provisions of WVCCPA and fall within the regulatory authority of the Attorney General pursuant to W.Va. Code §§ 46A-7-101 *et seq.*

31. The WVCCPA contains an all-encompassing, blanket prohibition against "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce . . .," W.Va. Code § 46A-6-104. The WVCCPA delineates at least 15 types of conduct that constitute *per se* violations, W.Va. Code § 46A-6-102(7). However, the statutory list is not intended to be all inclusive. *Id.*

32. The WVCCPA specifies that the term "unfair methods of competition and unfair or deceptive acts or practices" means and includes, **but is not limited to**, certain conduct including the following:

The act, use or employment by any person of any deception, fraud, false pretense, false promise or misrepresentation, or the concealment, suppression or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any goods or services, whether or not any person has in fact been misled, deceived or damaged thereby;

See W.Va. Code § 46A-6-102(7)(M).

33. The WVCCPA provides:

The attorney general may bring a civil action against a creditor or other person to recover a civil penalty for willfully violating this chapter, **and if the court finds that the defendant has engaged in a course of repeated and willful violations of this chapter**, it may assess a civil penalty of no more than \$5,000.00 for each violation of this chapter.

See W.Va. Code § 46A-7-111(2) (emphasis added).

34. The West Virginia Supreme Court of Appeals has defined the term “willful” as meaning “intending the result which actually comes to pass; design; intentional; not incidental or voluntary.” *State v. Saunders*, 618 S.E. 2nd 173, 178 (W.Va. 2006). The Court explained that “willful misconduct includes all conscious or intentional violations of definite law or rules of conduct, as distinguished from inadvertent, unconscious, or involuntary violations.” *Id* at 178-179, *citing Prince v. State Compensation Commissioner*, 13 S.E.2nd 396 (W.Va. 1941) (internal quotations omitted).

35. In its briefs, Cav’s Coach represents that its inability to make refunds for cancelled trips was not willful. It argues that this outcome was the result of “bad business decisions,” “circumstances beyond their control,” “poor planning,” and “unfortunate events” and that Cav’s Coach “did not intend” for these unfortunate events to occur. *See generally* Cav’s Coach’s Motion for Summary Judgment and Response to State’s Motion for Summary Judgment.

36. However, it is evident that Cav’s Coach made conscious decisions to continue to operate its business in a manner that made the events that led to this lawsuit not only foreseeable, but virtually unavoidable. For example, Cav’s Coach made a conscious decision to spend the money that it received from groups and consumers on everyday operating expenses rather than setting aside the funds in trust so that refunds could be made in the event of a trip cancellation. Cav’s Coach also continued to operate its business knowing that it was undercapitalized to the extent that it could not repair its buses or afford to hire replacement buses if its buses broke down.

37. While it may be true that Cav’s Coach did not “intend” for these events to occur, it made a conscious decision to continue to operate its business with reckless disregard

for its ability to fulfill its obligations under contracts to provide charter bus services and to make refunds when its obligations could not be fulfilled.

38. The Court also notes that Cav's Coach continued to operate its business in this reckless manner after the Circuit Court of Roane County entered an Order requiring that it make "full and immediate refunds" in the future whenever it could not fulfill its obligations under contracts to provide charter bus services.

39. The Court finds that Cav's Coach's failure to make refunds to groups and consumers after unilaterally cancelling trips and otherwise failing to meet its obligations under contracts to provide charter bus services constitutes unfair or deceptive acts or practices in violation of W.Va. Code § 46A-6-104.

40. The Court also finds that Cav's Coach has engaged in a course of repeated and willful violations of the WVCCPA and, as such, it is appropriate to impose a civil penalty as authorized by W.Va. Code § 46A-7-111(2).

41. The Court further finds that the following factors are relevant to a determination of the amount of the civil penalty: the number of trips cancelled or contracts violated, three; the number of persons potentially affected by the cancellation of trips or contracts violated, 79; the amount of refunds owed and the length of time that elapsed before refunds were made; the necessity of legal action by the Attorney General to secure refunds; and the repeated nature of the conduct.

42. Upon the basis of the foregoing, the Court finds that Cav's Coach should be assessed a civil penalty of \$395,000.00.

43. In its Complaint, the State asked that it be reimbursed for its costs, including attorneys' fees, incurred in the investigation and prosecution of this matter.

44. In *CashCall, Inc. v. Morrisey*, 2014 WL 2404300, the West Virginia Supreme Court of Appeals held that the Attorney General could be awarded costs and attorneys' fees for the successful prosecution of an enforcement action under the WVCCPA. The Court upheld an award of \$446,180.00 in attorneys' fees to the Attorney General, based upon an hourly rate of \$350.00 for Assistant Attorneys General Norman Googel and Doug Davis (\$349,825.00 for Googel and \$96,355.00 for Davis). *Id.* at * 9, 17-19.

45. In reaching its conclusion, the Court in *Cash Call, Inc. v. Morrisey* cited W.Va. Code § 46A-7-108 (authorizing the Attorney General to obtain the full array of equitable relief) and *Sally-Mike Properties v. Yokum*, 365 S.E. 2d 246 (W.Va. 1986)(authorizing an award of attorney's fees without express statutory authorization "when the losing party has acted in bad faith, vexatiously, wantonly or for oppressive reasons." *CashCall v. Morrisey* at * 17 (internal citations omitted).

46. The Court finds that the Attorney General is entitled to an award of its costs and attorney's fees based upon the actions of Defendants in this matter.

47. The State represents that its counsel expended 140.7 hours in the investigation and litigation of this case, consisting of 62.0 hours by Assistant Attorney General Chris Carlson and 78.7 hours by Senior Assistant Attorney General Norman Googel. The State further represents that Chris Carlson (two years of experience) and Norman Googel (38 years of experience) should be reimbursed at the rates of \$250.00 and \$400.00 per hour, respectively. The State also represents that it incurred costs of \$965.30, consisting of \$200.00 in court filing fees and \$765.30 paid to David T. Bolin CCR for two investigative depositions and transcripts.

48. The Court finds that the hours expended by the Attorney General in the

investigation and prosecution of the case and the hourly rates requested are reasonable. Upon this basis, the Court finds that the Attorney General is entitled to an award of \$47,945.30 in attorneys' fees and costs.

ORDER

WHEREFORE, upon the basis of the Parties' Stipulation, which this Court adopts and incorporates herein, and the Court's ruling on the Parties' Cross Motions for Summary Judgment, it is therefore ORDERED, ADJUDGED, and DECREED as follows:

1. The Defendants are permanently ENJOINED and PROHIBITED from accepting money from individuals, groups, or any entities for the purpose of providing charter bus transportation; arranging, scheduling, or organizing charter bus transportations or any travel or tourism activities; and from engaging in the business of providing any of the foresaid or related travel or tourism services, directly or indirectly. Provided, however, Defendant Christopher Cavender is not prohibited from engaging in other types of businesses, including but not limited to the ownership, operation, or management of hotels, motels, or other lodging facilities for consumers.

2. The State acknowledges that the Defendants made a payment of \$22,682.00 to the Attorney General as required by the Order previously entered herein on July 27, 2017, and that this payment has been distributed by the Attorney General as follows: \$10,382.00 to Kermit Area School; \$7,500.00 to Crum Middle School; \$2,400.00 to Connie Viars, and \$2,400.00 to Christopher Spurlock.

3. The Defendants represent that no further refunds are owed to any consumers who paid money to the Defendants for charter bus transportation or other related services that were cancelled by the Defendants. Provided, however, if it becomes known that other consumers are

owed refunds for charter bus transportation or other related services that were not provided, the Defendants agree to make such refunds within 30 days after it becomes known that refunds are owed. For the purposes of this provision, the parties define a valid claim for refunds as: failure to refund money paid by consumers to Defendants for charter bus transportation or other related services that were not provided by Defendants for any reason not involving fault of the consumer; or, failure to refund money paid by consumers to Defendants for charter bus transportation or other related services in those instances where the consumers cancelled the services at least 30 days prior to the date that the services were to be provided. If the Defendants dispute a refund claim, the consumer shall be required to provide proof of payment. The parties further agree that the Defendants' failure to satisfy the judgment entered against them in the case of *Alice Rider v. Cav's Coach Company, LLC*, Civil Action No. 14-C-221 in the Circuit Court of Boone County is excluded from this provision.

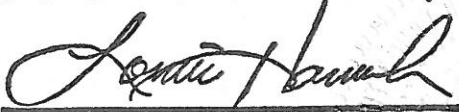
4. The State is awarded a civil penalty against the Defendants in the amount of \$395,000.00 as authorized by W.Va. Code § 46A-7-111(2).

5. The State is also awarded a judgment against Defendants in the amount of \$47,945.30, consisting of \$46,980.00 in attorneys' fees and \$965.30 in costs.

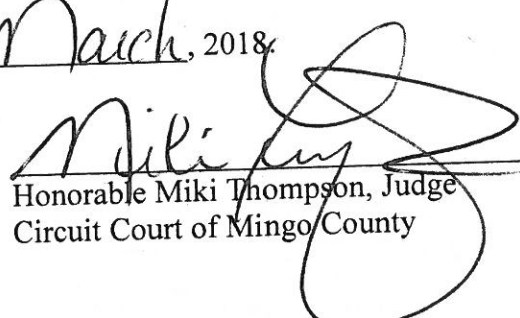
It appearing that all issues in this matter have now been adjudicated, the Clerk is directed to remove this action from the active docket of this court subject to the parties' rights to enforce the terms of this Order. The Clerk is further directed to forward attested copies of this Final Order to counsel of record for the parties.

ENTERED this 15th day of March, 2018.

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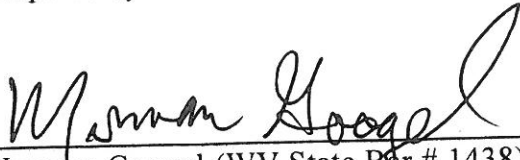


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Honorable Miki Thompson, Judge
Circuit Court of Mingo County

Prepared by:

A handwritten signature in black ink, appearing to read "Norman Googel", written over a horizontal line.

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